
In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:)
) Chapter 13 Case
ANTOINETTE WILLIAMS)
) Number 95-42630
)
Debtor)

**ORDER ON JOINT MOTION FOR ENTRY OF ORDER
CONTAINING FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The above-captioned case was filed on December 7, 1995, and came on for confirmation on April 23, 1996. The Trustee objected and I sustained the objection dismissing the case based on the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Debtor had a previous Chapter 13 case, number 93-41579, which was confirmed and would have paid a 100% dividend to all creditors had it been successful. However, that case was dismissed on November 6, 1995. During the pendency of the previous case the Debtor incurred debt in the amount of \$300.00 with Speedy Cash. Debtor testified and I find that she borrowed the money during the pendency of the previous case because her hours at work had been reduced and she was having difficulty meeting her obligations. The terms of the Order confirming Debtor's previous plan, however, provide

the following:

Debtor shall not incur any indebtedness without the approval of the Court or the Trustee.

The Trustee argued that Debtor's conduct in borrowing funds while in a Chapter 13 case without approval showed bad faith. The Trustee also argued that the dismissal of her previous case, which would have paid a 100% dividend, followed by the filing of this case which provided for a pro rata dividend to unsecured creditors evidenced her bad faith.

CONCLUSIONS OF LAW

The Trustee's objection is sustained. A debtor's circumstances can certainly change so as to necessitate the filing of a case which will not provide as favorable treatment for creditors as an earlier case. *See In re Jones*, 105 B.R. 1007 (N.D. Ala. 1989). Thus, the refiling of a pro-rata case is not, *per se* wrongful. However, Trustee's alternative ground is supported by the evidence.

The standard for determining whether a petition is filed in good faith is a "totality of the circumstances" test. *See Johnson v. Home State Bank*, 501 U.S. 78, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991); *Jim Walters Homes, Inc. v. Saylors*, 869 F.2d 1434 (11th Cir.1989); *Kitchens v. Georgia Railroad Bank and Trust Co.*, 702 F.2d 885 (11th Cir.1983). The Eleventh Circuit Court of Appeals included within its list of factors "the motivations

of the debtor and his sincerity in seeking relief under the provisions of Chapter 13" and "the circumstances under which the debtor has contracted his debts." Id. at 889. Here, Debtor borrowed money during the pendency of her last case contrary to this Court's order and subsequently refiled one month later adding the debt to her schedules. As a result, I now hold that the Debtor's incurring of debt during the pendency of the previous case was willful, that it violated the terms of the confirmation order in her case, and that her dismissal and near immediate refiling of this case evidences bad faith¹. This holding is consistent with, though not required by, 11 U.S.C. Section 109(g) which provides that no individual may be a debtor under title 11 if at any time during the preceding 180 days debtor's case was dismissed due to her willful failure to abide by orders of the Court. Debtor's previous case was dismissed by the Court on November 6, 1995, for non-payment. Therefore, although Section 109(g) does not expressly prohibit the Debtor from refiling this case, it evidences a congressional finding that debtors who willfully disobey court orders are not acting in good faith. At the very least the refiling of this case has the effect of bringing within the protection of the automatic stay a debt which she incurred in violation of a previous Court order.

Because the amount of that debt was not large and because the Debtor clearly was facing some economic necessity to borrow those funds, this is a difficult finding for this Court to reach, particularly when it cannot be directly shown that the incurring of

¹Debtor's prior case was not dismissed because of her unauthorized borrowing, because the Court was not aware of it.

that debt directly led to a reduction in the dividend to creditors in this subsequent case. Nevertheless, the potential for unauthorized debt resulting in such unfair treatment is clear. The Debtor's conduct cannot be excused merely because the amount in question is relatively small. In short, when Debtor elected to borrow money without the authority of the Court, she was not entitled to the protections of Chapter 13 for that debt and her effort to dismiss and refile in order to gain those protections for the unauthorized debt is evidence of bad faith that this Court cannot overlook. Accordingly, the Court dismissed the case at the hearing and enters these Findings of Fact and Conclusions of Law in response to the parties' Joint Motion for entry of specific findings.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of September, 1996.